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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the United States:

Petitioner, The Great Lakes Towing Company, hereby petitions for the issuance of a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, rendered herein on January 12th, 1948.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This controversy involves a civil action in Admiralty for alleged negligent towage and the validity of an exemption from negligence clause in the contract of private towage.

In the nighttime on May 8th, 1945, at the Port of Toledo, Ohio, petitioner's Steam Tug Idaho had the stern towing hawser from respondent's Steamer Consumers Power, which was making use of her own propelling power, assisting the vessel stern first out of a slip, when the after-

end of the vessel struck the submerged bank of the Maumee Bay Entrance Channel and a buoy thereon and sustained damage.

In its harbor towage operations at various ports and places on the Great Lakes, including Toledo, Ohio, petitioner is engaged in the business of furnishing private towage by water for hire, and is not a common carrier. The only element of public control is afforded by a Consent Decree filed June 15th, 1914, in the District Court of the United States for the Northern District of Ohio, Eastern Division, in a suit brought by the United States of America under the Sherman Act (Docket No. 8003, Equity), because of alleged discriminatory rates theretofore given to certain Great Lakes vessel operators. Said Consent Decree only requires petitioner to treat all customers equally as to rates and terms and conditions for similar towage services. It privately publishes its own Tariffs from time to time and distributes them to its prospective customers.

The petitioner herein has been judicially held to be a private tower by water for hire in its harbor towage operations, as opposed to a common carrier, in the case of *Pioneer Steamship Company vs. The Great Lakes Towing Company*, D. C. N. D. Ohio, E. D. (1946) 68 F. Supp. 757, also in the case of *The Kunkle Bros.*, D. C. N. D. Ohio, E. D. (1914) 211 F. 540.

The contract of private towage between the petitioner and respondent included the following Tariff Clause:

> "17. When a vessel is towed or pushed stern first by one tug at her bow, or stern, or is being winded by one tug at her bow, the service will be under the direction and control of the master of the vessel so assisted, and the tug will not be liable for any damage that may be sustained or caused by the vessel coming into contact with any other craft, dock or other object, or by stranding or touching bottom, unless the tug fails to follow orders received by the master of the tug from the master in charge of the vessel being served, and the

> master and crew of the tug shall be and shall be held to be the servants and agents of the vessel served. (It is recommended that in stern first and winding operations in those ports where more than one tug is stationed, the vessel order two tugs.)"

Admittedly no orders were received by the master of the tug from the master in charge of the vessel being served.

This clause (17) was patterned after a similar clause approved by this Court in *Sun Oil Company v. Dalzell Towing*, 287 U. S. (1932) pp. 292-293 as follows:

> "When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom."

Respondent sued the petitioner in the District Court of the United States for the Northern District of Ohio, Eastern Division. The trial was before the Court without a jury, and District Judge Jones, in a Memorandum Opinion filed February 6th, 1947, held the petitioner and the respondent equally at fault and refused to give effect to said Paragraph (17) of petitioner's Tariff (R. p. 179); officially reported 73 F. Supp. 359.

An Interlocutory Decree was filed on March 17th, 1947 (R. p. 188), adjudging that respondent recover one-half of its provable damages from the petitioner.

Petitioner appealed from said Interlocutory Decree and the Circuit Court of Appeals for the Sixth Circuit in an opinion filed January 12th, 1948, affirmed the District Court. A judgment was rendered on the same date pursuant thereto (R. p. 221).

STATEMENT DISCLOSING JURISDICTIONAL BASIS FOR THIS COURT TO REVIEW THE JUDGMENT IN QUESTION.

Sec. 240 of the Judicial Code as amended (28 U. S. C. 347) provides the judicial basis for this Court to review the judgment in question.

This petition has been filed within the statutory period of three (3) months provided for by 28 U. S. C. 350.

THE QUESTIONS PRESENTED.

There are two (2) principal questions presented, as follows:

First: Whether a tower by water for hire engaged in the performance of contracts of private towage, and not as a common carrier, may contract against its negligence; and

Second: Whether the decisions of the District Court and the Circuit Court of Appeals for the Sixth Circuit in this case are not contrary to the opinion of this Court in the case of *Sun Oil Co. vs. Dalzell Towing Co.* (October Term 1932) 287 U. S. 291.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The following are the reasons relied on by the petitioner:

First: The Circuit Court of Appeals for the Sixth Circuit in this case has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *The Oceanica* (1909) 170 F. 893, on the same matter, viz: the right of a private tower by water for hire to contract against its negligence.

Second: The Circuit Court of Appeals for the Sixth Circuit in this case has decided an important question of maritime law concerning the right of a private tower by water for hire to contract against its negligence, which has not been, but should be settled by this Court for the benefit of the maritime industry.

Third: The Circuit Court of Appeals for the Sixth Circuit in this case has decided a federal question, namely, the right under the maritime law of a private tower by water for hire to contract against its negligence, in conflict with the decision of this Court in *Sun Oil Co. vs. Dalzell Towing Co., supra.*

PRAYER FOR RELIEF.

WHEREFORE, the petitioner, by its counsel, prays that a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit be issued to the end that the judgment of that Court be reversed and for such other relief as this Court may deem appropriate in the premises.

WALKER H. NYE,
Proctor for The Great Lakes Towing Company, Petitioner.

McKEEHAN, MERRICK, ARTER & STEWART
and GEORGE WILLIAM COTTRELL,
CARL A. SCHIPFER,
W. ALEXANDER ELDRIDGE,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION.

STATEMENT OF THE CASE.

Rather than repeat, we refer to the summary of the matter involved appearing at the beginning of the petition.

We will now discuss the two questions presented in the order named in the petition.

FIRST QUESTION: WHETHER A TOWER BY WATER FOR HIRE ENGAGED IN THE PERFORMANCE OF CONTRACTS OF PRIVATE TOWAGE, AND NOT AS A COMMON CARRIER, MAY CONTRACT AGAINST ITS NEGLIGENCE.

The notion that this Court in the case of *The Syracuse* (1870) 79 U. S. (12 Wall.) 167, has determined that a private tower by water for hire may not contract against its negligence is a fallacious one.

All that this Court decided in that case was that a special agreement between the owner of the canal boat, which was later sunk and damaged, and the owner of the Tow Boat Syracuse, that the canal boat was being towed "at her own risk," did not relieve the Tow Boat Syracuse from liability for faults due to negligence.

An examination of the case reveals that Mr. Robert D. Benedict, a well-known Admiralty advocate of his day, and proctor for the Syracuse in that case, recognized himself that the meaning of the particular towage contract in question was that the owner of the canal boat:

> "* * * would bear the risks of the navigation, *provided the steamboat which furnished the propulsive power was navigated with ordinary care and skill.* Any other construction of the rights of the parties would deprive that clause of the contract of meaning and make it a snare." (p. 170 of the opinion.)

It further appears that the answer in behalf of the Tow Boat Syracuse made no claim of exemption from liability for negligence and that the only question decided in the case was whether the Syracuse was at fault and guilty of negligent acts of navigation.

We submit that the true principle enunciated by this Court in *The Syracuse* case, which we will hereinafter refer to as "The Syracuse Rule," is as follows:

> "A clause in a contract of private towage providing that the ship, vessel, boat or other craft is to be towed 'at her own risk,' or similar language, will not be construed as a contract intended to relieve the towing vessel from faults due to acts of negligence."

The Circuit Court of Appeals for the First Circuit in the case of *Winslow vs. Thompson* (1904) 134 F. 546, applied the Syracuse Rule. There it appeared that as a result of an oral conversation between the master of a certain schooner and the captain of a tug that when the master of the schooner was advised of a hazardous condition in the channel to be navigated, he agreed to "assume the risk" of the tow.

It was contended in behalf of the schooner that a tug engaged in general towing service cannot stipulate effectively for such an assumption, citing *The Syracuse.* The Circuit Court of Appeals for the First Circuit stated as follows at p. 549 of the opinion:

"Inasmuch as the law is settled beyond all question that a tug is not a common carrier, and is, therefore, obligated only for reasonable diligence, which, in view of the nature of the service, and, also, in view of the fact that ordinarily the tow is a stranger and the tug is at home, means very great diligence, 'The Syracuse' cannot be applied to the extent claimed by the libelant."

It thus appears that that Court put the same interpretation upon the case of *The Syracuse* for which we contend, namely, it is not authority for the proposition that a tug cannot stipulate against its own negligence. Particular attention is called to the comment of the Circuit Court of Appeals for the First Circuit (134 F. 546) in the following language at the bottom of p. 550 and the top of p. 551 of the opinion:

"The Syracuse was being towed in the neighborhood of the Battery, New York Harbor, where, on account of the number of vessels and the currents, the conditions were difficult. The tide, also, was setting in at that time unusually strong, so that there was inevitably considerable danger in taking a tow so large as The Syracuse at that particular time (page 169, 12 Wall., 20 L. Ed. 382). The answer set up (page 169, 12 Wall., 20 L. Ed. 382) that by special agreement, the tow was moved at her own risk. The construction put on this by the counsel for the tug, who was Mr. R. D. Benedict, an admiralty lawyer of very great experience, was that it amounted to a contract on the part of the tow that she would assume the hazards, 'provided the steamboat which furnished the propulsive power was navigated with ordinary care and skill.' This was all that he claimed, and this is practically the position taken by the Court (page 171, 12 Wall., 20 L. Ed. 382), and is undoubtedly the true rule."

All the case of *The Syracuse* and similar cases hold in substance is that a contract between tug and tow, whether oral or written, which simply provides that the towage service will be rendered "at the risk of the tow" is not

broad enough in scope to free the tug from liability for negligence. In no sense of the word is it authority for the proposition that a stipulation against negligence, if made in clear terms, is invalid.

The Second Circuit Court of Appeals in the case of *The Oceanica* (1909) 170 F. 893, reversing the District Court, disagreed with the opinion of this Court in *The Syracuse* and held that when the owner of the tow agreed to "assume all risks," the towing vessel being only liable for negligence, as stated at p. 894 of the opinion:

> "* * * no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence."

Circuit Judge Ward discussed *The Syracuse, supra,* and commented at p. 895 of the opinion:

> "The learned judge must have meant that an agreement by the tow to tow at her own risk should not be construed to cover the tug's negligence. This was the view of Judge Nelson in the court below (*The Syracuse,* 6 Blatchf. 2, Fed. Cas. No. 13,717), who began his opinion with these words:
>
> > 'One ground of defense set up is that by the contract of towage it was agreed that the canal boat was to be towed by the steamer at her own risk. The answer to this is that this contract does not exempt the steamboat from liability for damages caused to the canal boat by the negligence of those in charge of the steamboat.' "

Circuit Judge Ward concluded at p. 900 of the opinion:

> "We do appreciate keenly that the decision of the majority of the court as to the right of a tug to contract against her own negligence is a departure from previous decisions. The question should, and we hope will, be set at rest in this case by the Supreme Court."

However, this Court denied certiorari on October 18th, 1909 (215 U. S. 599).

The principle announced by the Circuit Court of Appeals for the Second Circuit in *The Oceanica, supra,* has been applied in the cases listed below.[1]

This Court in the case of *Sun Oil Co. vs. Dalzell Towing Co.* (October Term 1932), 287 U. S. 291, clearly held that a private tower by water for hire could, by the terms of the contract of towage, relieve itself from liability for faults due to negligence.

Below, the Second Circuit Court of Appeals in the *Dalzell* case (55 F. (2d) 63) and the District Court for the Southern District of New York, 47 F. (2d) 598, announced the same principle, citing *The Oceanica* case, *supra.*

This Court concluded its opinion in the *Dalzell* case at p. 295 as follows:

> "The decree under consideration is not in conflict with the decisions of this Court cited by petitioner, *The Steamer Syracuse,* 12 Wall. 167, and *Compania de Navegacion v. Ins. Co.,* 277 U. S. 66. Neither involved an agreement similar to the provisions of the pilotage clause on which this case turns. Decree affirmed."

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[1] *Sun Oil Company vs. Dalzell Towing Co., Inc.,* C. C. A. Second (1932) 55 F. (2d) 63; affirmed (1932) 287 U. S. 291.

Monk vs. Cornell Steamboat Co., C. C. A. Second (1912) 198 F. 472 at 475.

Ten Eyck vs. Director General of Railroads, C. C. A. Second (1920) 267 F. 974 at 976.

Owen McCaffrey's Sons vs. Director General of Railroads, D. C. S. D. N. Y. (1922) 282 F. 728 at 730.

The G. R. Crowe, D. C. S. D. N. Y. (1922) 287 F. 426 at 427.

The Pacific-Maru, D. C. S. D. Ga. E. D. (1925) 8 F. (2d) 166 at 170.

The Dalzelite, D. C. S. D. N. Y. (1930) 48 F. (2d) 598 at 600; affirmed sub-nom. 287 U. S. 291.

The Primrose, D. C. E. D. N. Y. (1933) 3 F. Supp. 267 at 268.

The John J. Feeney, D. C. E. D. N. Y. (1933) 3 F. Supp. 270 at 272.

Phoenix Construction Associates vs. City of New York, D. C. E. D. N. Y. (1940) 33 F. Supp. 666 at 667.

Mengel Co. vs. Inland Waterways Corp., D. C. E. D. La., New Orleans Div. (1940) 34 F. Supp. 685 at 690.

As discussed, *supra, The Syracuse* towage clause there involved was simply that the towing venture was "at the risk" of the tow.

The other case referred by this Court, viz: *Compania de Navegacion Interior, S. A. vs. Firemen's Fund Insurance Company,* commonly known as *The Wash Gray* case (October Term 1927) 277 U. S. 66, involved a contract made for towing the Wash Gray by a steamer. The towage contract provided that the towing steamer was to furnish the hawser, but that "all other risks and expenses" were to be borne by the Wash Gray; and further provided that the towing steamer was "not responsible in any way for loss or damage to the Wash Gray." [2]

In distinguishing these two cases, in the concluding remarks of the *Dalzell* case, *supra,* it seems clear that this Court meant that neither *The Syracuse* nor *The Wash Gray* cases involved an agreement releasing the towing vessel from liability for acts of negligence. However, the *Dalzell* case definitely involved such an agreement.

The *Dalzell* case has been cited and applied in the several cases listed below.[3]

---

[2] See District Court opinion, D. C. E. D. La. New Orleans Div. (1926) 14 F. (2d) 196 at 200.

[3] *The H. C. Jefferson,* D. C. E. D. Penna. (1946) 69 F. Supp. 650 at 651.

The St. Francis, D. C. D. Md. (1947) 72 F. Supp. 50 at 57. As stated at p. 57 of the opinion: "The prevailing underlying principle is based on the proposition that a tug is not a common carrier and, therefore, the Towing Company may stipulate against its own negligence or default."

And the towage clause provided: "The master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft, and their owners, and that the Tug Company only undertakes to provide motive power." (p. 51.)

It further appears at p. 52 of the opinion: "That neither destroyer (the vessels in tow) had any member of a crew on board, neither had any motive power, and both were 'dead' ships."

(Continued on following page)

In the case of *The Cutchogue*, D. C. S. D. N. Y. (1925) 10 F. (2d) 513; affirmed by C. C. A. Second, 10 F. (2d) 671, certiorari denied, 273 U. S. 703, the terms of the towage contract are set forth at p. 514 of the District Court's opinion.

These terms provided in substance that, "all towing will be done at the risk of the tow"; that the Towing Company would not be liable for negligence, and

> "that the masters and crews of the tugs in the performance of the towage service shall become the servants of and identified with the vessel or craft towed, whether singly or with other vessels, and that this applies to the shifting of floats in and around slips, piers and float bridges."

Said towage clause was held valid.

The same type of clause was held valid in the case of *The Mercer*, D. C. S. D. N. Y. (1926) 14 F. (2d) 488.

In *The Melvin and Mary*, D. C. E. D. N. Y. (1938) 23 F. Supp. 398, the towage contract provided in substance that the Towing Company would not be held liable for any negligence, and such clause was held to be a valid one.

Particular attention is called to the fact that under Clause (17), the towage clause involved in the case at bar, the prospective customer is given two choices:

> **First**: To hire two tugs, one to assist on the headline of the towed vessel, and the other on the stern line, when said clause has no application; and
>
> **Second**: To hire only one tug, when said Clause (17) becomes a part of the contract of towage.

(*Continued from preceding page*)

The Henry W. Card, D. C. E. D. N. Y. (1943) 51 F. Supp. 380 at 382. There clause relieving towing vessel from "errors of navigation" construed to mean "negligence or negligent navigation of the towing vessel." (p. 383.)

Moran Towing and Transportation Co. vs. Navigazione Liberia Triestina, S. A., C. C. A. Second (1937) 92 F. (2d) 37 at 38.

The petitioner in this case has learned from many years experience in various ports and places on the Great Lakes that there is a greatly increased risk of possible damage when a vessel is to be moved stern first or winded when she only requests and has the assistance of but one tug, and we submit the petitioner has taken a reasonable position when it states in Clause (17) that if a vessel owner desires assistance under those circumstances, which is a very special circumstance, those on the tug then become the servants and agents of the vessel assisted.

The View of the Ninth Circuit Court of Appeals is Contrary to the Second Circuit on This Question.

Although some of the cases in the Ninth Circuit can be distinguished by application of *The Syracuse* rule, *supra*, that Court is apparently of the opinion that it is against public policy to allow even a private tower by water for hire to contract against its negligence. See:

Hall-Scott Motor Car Co. vs. Universal Insurance Co., C. C. A. Ninth (1941) 122 F. (2d) 531 at 537;

Mylroie vs. British Columbia Mills Tug and Barge Co., C. C. A. Ninth (1920) 268 F. 449; affirmed by this Court on another ground, 259 U. S. 1, Chief Justice Taft concluding at the end of the opinion:

"This makes it unnecessary for us to consider the contention on behalf of the barge that the exemption clause is valid."

Sacramento Navigation Co. vs. Salz, C. C. A. Ninth (1925) 3 F. (2d) 759 at 761, reversed by this Court on other grounds, 273 U. S. 326;

Alaska Commercial Company vs. Williams, C. C. A. Ninth (1904) 128 F. 362.

The Sea Lion, D. C. N. D. California, S. D. (1926) 12 F. (2d) 124 at 126, where the District Judge stated after discussing the view of the Second Circuit Court of Appeals:

"Hence I consider myself bound to hold that in this circuit a tug cannot exempt itself from liability for negligence."

Congress by Two Statutory Amendments to the Maritime Law Has in Effect Declared the Public Policy of the Country with Respect to Liability for Negligence in Maritime Ventures.

The Harter Act (Act of Congress of February 13th, 1893, Chapter 105, Sec. 3; 27 Stat. 445; 46 U. S. C. Sec. 192).

This Act provides in part and in substance that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, that:

"* * * neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

The Carriage of Goods by Sea Act (Act of Congress of April 16th, 1936, Chapter 229, Sec. 4; 49 Stat. 1210; 46 U. S. C. Sec. 1304(2)(a)).

This section provides in part as follows:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;"

It is important to note that both of these Acts of Congress apply to common carriers by water.

Certainly if it is not against the public policy of the United States for common carriers by water for hire to be immunized from liability for the "act, neglect or default of the master, mariners, pilot or the servants of the carrier in the navigation or in the management of the ship," we respectfully submit it should not be against public policy for a private tower for hire to stipulate that in the event of a stern first or winding operation, when only one tug is

hired, that the tug becomes the servant of the tow, thus immunizing the tug and her owner and operator from liability.

SECOND QUESTION: WHETHER THE DECISIONS OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THIS CASE ARE NOT CONTRARY TO THE OPINION OF THIS COURT IN THE CASE OF SUN OIL CO. VS. DALZELL TOWING CO. (OCTOBER TERM 1932) 287 U. S. 291.

Petitioner submits that the decisions of the District Court and the Circuit Court of Appeals in the case at bar are contrary to the opinion of this Court in the *Dalzell* case.

Basically the *Dalzell* case is authority for the principle under the maritime law that a private tower by water for hire may contract against its negligence and that it may accomplish this result by making its own tug captain employee the servant of the owner of the tow by agreement.

If this Court, when the opinion in the *Dalzell* case was prepared, was of the opinion that it was against public policy to permit a private tower by water for hire to contract against its negligence, it certainly would not have approved of the towage clause therein involved.

What material difference does it make whether the tug captain or crew go on board the towed vessel or not?

It seems to us that when the captain of a tug goes aboard the vessel being assisted by a tug or tugs, this affords a basis for contending that the towing company has in reality taken complete command and control of the venture and should, therefore, respond in damages for the negligence of its captain. But even in this situation, the Supreme Court has held in the *Dalzell* case that it is a valid agreement to make the captain of the tug the servant of the tow, freeing the tug from liability.

In the case of *The St. Francis*, D. C. D. Md. (1947), *supra*, the following clause appearing at p. 51 of the opinion was made a part of the towage contract:

" 'The master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power.' "

Neither vessel in tow in this case had anyone on board, but the District Court held said clause valid to relieve the Towing Company from all liability and stated at p. 57 of the opinion:

"The validity of a provision in a towage contract making the master or crew of the tug the servant of the owners of the tow has heretofore been the subject of much diverse judicial consideration. See *Robinson on Admiralty*, pp. 670-673. But this has now finally resulted in the establishment of the validity of such a contract. *Sun Oil Co. v. Dalzell Towing Co.*, 1932, 287 U. S. 291, 53 S. Ct. 135, 77 L. Ed. 311; *The Primrose*, D. C., 3 F. Supp. 267; *The H. C. Jefferson*, D. C., 69 F. Supp. 650. The prevailing underlying principle is based on the proposition that a tug is not a common carrier and therefore the Towing Company may stipulate against its own negligence or default."

In the case of *The Pacific-Maru*, D. C. S. D. Ga. E. D. (1925) 8 F. (2d) 166, as appears at p. 169 of the opinion the towage clause therein involved provided in part as follows:

"* * * that the masters and crews of all such tugs shall, in the performance of such service or services, for said rates or other sums established by custom or contract, become and be the servants of said vessel, or craft, towed or handled in any way whatsoever and be identified therewith. * * *

"* * * irrespective of whether any employee of this company, or the master, or any of the crew of the tug, is, at the time of said service, aboard of said vessel or craft, or is in command thereof."

Such clause was held valid.

The essence of Clause (17) in the case at bar is that if a vessel only hires one tug to assist in a stern first opera-

tion, which is a hazardous venture, her owner agrees that for such towage operation:

"* * * the master and crew of the tug shall be and shall be held to be the servants and agents of the vessel served."

We submit that such a clause should be held to be a valid one on the principle of this Court's opinion in the *Dalzell* case.

CONCLUSIONS.

We submit that the questions presented bring this petition within the scope and meaning of Rule 38, Sec. 5, sub-sec. (b) of this Court for the following reasons:

First: The Circuit Court of Appeals for the Sixth Circuit in the case at bar, and the Circuit Court of Appeals for the Ninth Circuit in the cases mentioned at page 14 of this brief, have rendered decisions in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *The Oceanica, supra,* and similar decisions of that Circuit on the important principle of the maritime law concerning the right of a private tower by water for hire to contract against its negligence and this Court should resolve said conflict and finally determine this question.

Second: The Circuit Court of Appeals for the Sixth Circuit in this case has decided an important question of maritime law concerning the right of a private tower by water for hire to contract against its negligence, which has not been, but should be settled by this Court for the benefit of the maritime industry.

In the case of *Commercial Molasses Corp. vs. New York Barge Corp.* (October Term 1941), 314 U. S. 104 at 108, this Court granted certiorari:

"* * * to resolve an alleged conflict of the decision below with those of other Circuit Courts of Appeals, * * * and because of the importance in the maritime law of the principle involved."

The principle there involved concerned the question of whether the burden of proof, as distinguished

from the burden of evidence, lay on the bailor as owner of the cargo which was damaged as the result of the sinking of a barge in New York Harbor, or on the bailee which was a private carrier by water for hire, where there was an unexplained sinking of the barge.

Third: The Circuit Court of Appeals for the Sixth Circuit in this case has decided a federal question, namely, the right under the maritime law of a private tower by water for hire to contract against its negligence, in conflict with the decision of this Court in *Sun Oil Co. vs. Dalzell Towing Co., supra*, for the reasons mentioned in the foregoing brief.

Fourth: The narrow scope of the opinion in the case of *The Syracuse, supra*, decided by this Court in 1870, seventy-eight (78) years ago, followed by the opinion of the Circuit Court of Appeals for the Second Circuit in the case of *The Oceanica, supra*, decided in 1909, thirty (30) years ago, and the interim opinions of the Ninth Circuit and the First Circuit Courts of Appeals referred to in the foregoing brief, with the resulting confusion among the Circuits, should be finally resolved for the benefit of the maritime industry at this time, without further delay or waiting until another case arises.

In view of the foregoing, we respectfully request the Supreme Court to grant the petition for Writ of Certiorari.

Respectfully submitted,

WALKER H. NYE,
Proctor for The Great Lakes Towing Company, Petitioner.

McKEEHAN, MERRICK, ARTER & STEWART
and GEORGE WILLIAM COTTRELL,
CARL A. SCHIPFER,
W. ALEXANDER ELDRIDGE,
Of Counsel.

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Supreme Court, U.S.
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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1947.

No. 689

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

LAURENCE E. COFFEY,
1317 Chamber of Commerce Bldg.,
Buffalo 2, New York,
Proctor for American Steamship Company, Respondent.

RICHARDS & COFFEY,
LECKIE, MCCREARY, SCHLITZ & HINSLEA,
LAURENCE E. COFFEY,
LUCIAN Y. RAY,
Of Counsel.

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THE GREAT LAKES TOWING COMPANY,
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Respondent.

BRIEF FOR RESPONDENT.

Neither the District Court nor the Circuit Court of Appeals found it necessary to a determination of the case to make decision on the question whether petitioner could lawfully contract against liability for negligence.

The District Court made a finding of fact as follows:

> "Twenty-fourth: That master of the steam tug Idaho knew what was expected of the tug and selected the method of performing the maneuver without any request for instructions from the Steamer and the tug undertook to render its help and assistance in the normal and usual way without in any respect becoming subordinated to the direction or control of the Steamer or her master and, in fact, the master of the steam tug expected to signal the Steamer when the situation required the use of the Steamer's engines and he did not expect the Steamer to work her engines without order from him."

One of the conclusions of law of the District Court was:

> "Fifth: That the maneuver was jointly undertaken and required the cooperative enterprise of both

> the steam tug and the Steamer and under and upon the facts, the provisions of Clause 17 of the general terms and conditions of the respondent Towing Company's tariff did not have application."

The Circuit Court of Appeals, referring to its own decision in *Great Lakes Towing Co. v. Bethlehem Transp. Corp.*, 65 Fed. 2, 543, with regard to the facts involved in that case, said:

> "The master of the Yale (the tug) knew exactly what service was required of him and his vessel and he proceeded to perform that service but on his own initiative without subordination to, although with the cooperation of, the master of the Maryland."

With regard to the facts in this case and referring to the facts just recited, the court said:

> "This was precisely what happened in the present case and a conclusion similar to that reached in the cited case seems to be justified not only by the present facts but by the proviso in Paragraph 17 that the tug carries out the orders of the vessel master."

The decision of the Circuit Court of Appeals rests upon an interpretation of Paragraph 17 that it contemplated that any tug master to bring himself and his tug within the provisions of the clause would take some affirmative action to put himself under the direction and control of the master of the steamer.

While a review of the decisions of the Supreme Court led the Circuit Court of Appeals to indicate that it felt the doctrine of *The Syracuse*, 79 U. S. 167, was still controlling, nevertheless it did not have to decide that question and in reality all it did was decide the case upon an interpretation of Clause 17 of petitioner's tariff.

The court said:

> "Were we therefore compelled to decide the case upon the validity of paragraph 17, it might seem to us

that decision must be controlled by the doctrine of *The Syracuse,* whatever might be our own view of the principle or its applicability to the present case. A narrower ground for decision, however, appears."

It put its decision of the case in the following language:

"The proviso seems to contemplate that some direction would be sought and given. Here, there was no request for orders and no opportunity furnished for their being given. It would seem that something more was in contemplation by this provision than standard signals, or direction otherwise given that might fail in timeliness during operation. If it should be argued that the view here expressed emasculates the tariff provision if valid, the short answer would be that the master of the tug might readily have put the issue beyond doubt merely by asking the master of the steamer how he wished the maneuver to be performed. The tug, however, proceeded on its own initiative without requesting direction or furnishing an opportunity for direction to be given. We think Great Lakes Towing Co. v. Bethelehem, *supra,* rules the present controversy."

The Court also held that an amendment to Clause 17 made subsequent to the decision of the court in *Great Lakes Towing Co. v. Bethlehem Transp. Corp., supra,* by the addition of the words "and the master and crew of the tug shall be and shall be held to be the servants and agents of the vessels served" had no bearing upon the question whether the tug actually subordinated itself to the tow to bring the clause into operation.

Obviously the amendment was a mere statement of a legal conclusion that would have resulted from the application of Clause 17 as it read before the amendment if the clause came into operation and had validity.

The amendment was patently added with a design to secure the application of the rule of *Sun Oil Co. v. Dalzell Towing Co.,* 287 U. S. 291.

The Circuit Court of Appeals held that the Dalzell case had no application either to the facts of this case or the contract provisions involved in the case.

Clearly, as decided by the Circuit Court of Appeals, the case involves only an interpretation of a contract. The contract is that of the Towing Company which has a monopoly of towing for hire in most of the important ports of the Great Lakes. The Circuit Court of Appeals for the Sixth Circuit is probably more familiar with the conditions obtaining on the Great Lakes than any other court.

Petitioner is still operating under a decree of the Circuit Court of Appeals for the Sixth Circuit under decision reported as *United States v. Great Lakes Towing Company,* 208 Fed. 733, where the court held:

> "It is entirely safe to say that since 1904 the Great Lakes Towing Company has had no real competition in harbor towing at either of the 14 ports, except to a limited extent at Chicago for a little later period, and that it now controls 95% of the harbor towing on the Great Lakes at the 14 ports concerned."

We find difficulty in appreciating that the case presents any question which should be reviewed by the Supreme Court.

The doctrine of The Syracuse, 12 Wall. 167; 79 U. S. 167 (20 L. Ed. 382) that it is unlawful for a tug to contract against her negligence, still rules.

At the time of the argument of The Syracuse it was well settled that the tug could not by contract exempt herself from the obligation to use care and skill in her navigation.

Mr. Justice Nelson in *The Princeton,* 3 Blatchf. 54, Fed. Case 11,434 (1853) had held:

> "An agreement to be towed 'at the risk of the master and owners' of the tow, does not exempt the tug from proper and responsible care and skill in her navigation."

In *The Brooklyn*, 2 Ben 547, Fed. Case 1938 (1868), Mr. Justice Blatchford held at page 240:

> "In the present case the obligation of the steamboat not to commit a tort against the canal boat did not arise out of the contract of towage * * *. The obligation of the steamboat not to commit such tort arose out of the principle, applicable in all cases of tort '*sic utere tuo ut non alienum laedas.*' Her duty did not result the consideration paid or to be paid for the towage. It was imposed by the law, and would have existed even though her service had been gratuitous."

This policy of the law was so fixed and well settled that Mr. Benedict, who was proctor for the tug in the case, did not even urge that a contract under which the vessel was to be towed "at her own risk" had effect to relieve the tug from the obligation to exercise ordinary care and skill in her navigation.

A policy of the law could hardly be announced with more clarity or more definitely than as announced in the case of The Syracuse, where the Court said:

> "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

The doctrine was reaffirmed in *Compania de Navegacion v. Fireman's Fund Insurance Co.*, 277 U. S. 66 (1927) where in an opinion by Chief Justice Taft it was held:

> "The rule laid down by The Syracuse, 12 Wall. 167, 171 covers this point."

> *The case of Sun Oil Co. v. Dalzell Towing Co., 287 U. S. 291 (1932) does not have effect to make an attempt by the tug to relieve herself from liability for negligence lawful against the doctrine of The Syracuse.*

The Dalzell case arose out of the handling of the Tanker Sabine Sun in New York harbor in a movement in which several tugs were employed. The master of one of the tugs went on board the tanker and directed the maneuver. No fault was imputed to the tugs themselves, the fault charged being in connection with the maneuvering and direction. The tug master when he was on board the tanker not only directed the movement of the tugs but also under the agreement *handled the vessel herself* acting as her pilot. The vessel used her own power and was assisted by the tugs.

In its opinion the court distinguished the business of towage in which the respondent Towing Company was engaged, from the pilotage service rendered by the tug master when he was on board the towed vessel, saying:

> "Respondent's responsibility is not to be extended beyond the service that it undertook to perform. *It did not furnish pilotage.* The provision that its tug captains while upon the assisted ship would be the servants of her owner is an application of the well-established rule that when one puts his employee at the disposal and under the direction of another for the performance of service for the latter such employee while so engaged acts directly for and is to be deemed the employee of the latter and not of the former. Denton v. Yazoo & M. Valley R. Co., 284 U. S. 305, 308, 76 L. Ed. 310, 311, 52 S. Ct. 141."

It will be noted that the decision was grounded upon rules announced in other fields of law and in such cases as:

Standard Oil Co. v. Anderson, 212 U. S. 215, 220-225;

Linsted v. Chesapeake & Ohio Ry. Co., 276 U. S. 28, 32-35;

Denton v. Yazoo & M. Valley RR. Co., 284 U. S. 305, 308-311.

This court itself in the Dalzell case at page 295 said:

> "The decree under consideration is not in conflict with the decisions of this court cited by petitioner, The Syracuse, 12 Wall. 167, 20 L. Ed. 382, and Compania de Navegacion v. Fireman's Fund Ins. Co., 277 U. S. 66, 72 L. Ed. 787, 48 S. Ct. 459. Neither involved an agreement similar to the provisions of the pilotage clause on which this case turns."

However much the petitioner would like to find support in the Dalzell case for relief from liability for negligence while engaged in rendering towage services, its view that there is such support is not consistent with the language of the Supreme Court quoted above.

Respectfully submitted,

LAURENCE E. COFFEY,
Proctor for Respondent,
American Steamship Company,
1317 Chamber of Commerce Bldg.,
Buffalo 2, N. Y.

RICHARDS & COFFEY,
LECKIE, MCCREARY, SCHLITZ & HINSLEA,
LAURENCE E. COFFEY,
LUCIAN Y. RAY,
Of Counsel.